IN THE MISSOURI SUPREME COURT

BONZELLA SMITH, ***et al***	)	
	)	
Respondents	)	
vs.	)	**No. SC92646**
	)	
TIF COMMISSIONERS, ***et al.,***	)	
	)	
Appellants.	)	

Appeal from the Circuit Court of St. Louis City, Missouri
Case No. 0922-CC9379
Hon. Robert H. Dierker, Jr.
Division 18

SUBSTITUTE REPLY BRIEF AND RESPONSE BRIEF ON CROSS APPEAL OF APPELLANT NORTHSIDE REGENERATION, LLC (INTERVENORS NELSON AND MCINTOSH)

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INTRODUCTION

Intervenors dress their brief with jokes, asides, and insults coupled with numerous efforts to misdirect and, in some instances, mislead the Court. For example, in the context of the critical issue before the Court-- namely, what does *"any development project within a redevelopment area"* mean in the context of large-scale urban planning and TIF projects--Intervenors say that Appellants do not believe that the approval of a project is a prerequisite to the adoption of TIF financing (I.Br. 49,54,56). While that might be the target that Intervenors would prefer to shoot at, it is not an honest statement of Appellants' position. Appellants have always acknowledged that there must be a project (N.Br. 38-40; City Br. 22).

Northside believes, however, that it is improbable and illogical that the legislature would use the broadest possible language to define "redevelopment project" if it actually intended the extraordinarily narrow definition that the trial court picked. If the legislature intended a definition requiring a "specific" "shovel-ready" commitment, why didn't the legislature use the words "specific" or "shovel-ready" or anything remotely close to those concepts? Even more implausible is the notion that the legislature intended that the trial court, instead of the City, should decide on a case-by-case basis whether a proffered project is the size and shape that satisfies the TIF Act or comports with the development goals of the City and its residents.

Intervenors never address the contradiction between the statute's definition and the definition that the trial court used. Instead, Intervenors assume, without discussion, that the trial court's call for a shovel ready project of indeterminate size and scope is the right one.

Intervenors seek to distract the Court instead of taking on the seminal question. For example, Intervenors repeatedly warn the Court to be circumspect because of the threat of eminent domain (I.Br. 13,15, 16, 17). Intervenors know full well that the Redevelopment Plan and Redevelopment Agreement explicitly preclude the use of eminent domain (McIntosh Int. Ex. 4 at 16, 17 (A273, 274); McIntosh Int. Ex. 3 at ¶3.2 (A166)). Additionally, Intervenors somewhat hopefully misstate the workings of TIF financing, apparently believing that the Court does not possess even an elementary understanding of the incentive's risks and rewards. They offer, for example, the following quote from their testifying expert in their "Scheme of a TIF" section: "If things fly, the private investor will capture all the upward gains, and if things don't fly the public purse will remain with the stick" (I.Br. 13).

Intervenors know (or should know) that neither scenario can ever come to pass. If things "fly," and Northside creates incremental economic value in North St. Louis, Northside *may* ultimately recapture the billion dollars it will have invested to build streets, sewers and other necessary public infrastructure—and, in this circumstance, the citizens of North St. Louis will reap the benefits of newly constructed infrastructure as well as more comprehensive vertical development and area wide revitalization. Neither Northside, nor any other TIF developer, can ever recover more than its investment in public infrastructure. If the redevelopment should fail to create the projected new economic value, then, in that circumstance as well, the City and its citizens will keep the public streets and other infrastructure funded by private enterprise at no cost to anyone other than the developer. There is no "unfair advantage," as Intervenors put it (I.Br. 14 n.1). Without the streets, sidewalks and sewers that Northside must pay for--because the City cannot afford them--no one, neither Northside nor any other developer, will be able to attract any meaningful scale of new businesses or residents to North St. Louis.

TIF financing is an economic development tool, designed to allow municipalities to enlist private enterprise to pay for the construction of public improvements. More than a decade ago, the City's citizens, politicians and consultants joined together to conduct a comprehensive study of the prospects for future redevelopment of North St. Louis.[1] The task force concluded that, absent someone willing to fix the City's streets, sewers and other infrastructure, and absent the City's willingness to adopt TIF financing to attract that private investment, North St. Louis had scant hope of reversing decades of decay and decline. Intervenors' suggestion that they know better than the City or its task force, and that the City's long-suffering citizens should simply wait for "free markets and organic growth" to save North St. Louis, is a callous refrain.

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[1] *See* A Plan for the Neighborhoods of the 5th Ward c. 2000 ("5th Ward Plan") introduced by Intervenors (McIntosh Int. Ex. 10; A337).

STATEMENT OF FACTS

ADDITIONAL STATEMENT OF FACTS PURSUANT TO RULE 84.04(F)

Intervenors Mischaracterize TIF Financing

And The Northside Project In Their "Scheme of a TIF" Section (I.Br. 13-17)

As the title to their section suggests, Intervenors have no intention of providing the Court with "a fair and concise statement of the facts relevant to the questions presented for determination without argument." Mo.R.Civ.P. 84.04. What follows is an indictment of TIF financing replete with misstatement and unfounded innuendo.

Intervenors mention the threat of eminent domain seven times in three and a half pages (I.Br. 13, 15, 16, 17), without telling the Court that the Redevelopment Plan and Redevelopment Agreement provide that "[t]he use of eminent domain will not be allowed pursuant to this Redevelopment Plan" and the Redevelopment Plan further indicates that Northside "has not identified any owner-occupied residences for acquisition through the use of eminent domain" (McIntosh Ex. 4 at 16, 17 (A 273, 274); McIntosh Ex. 3 at §3.1 (A 166)). Northside does *not* "still ha[ve] the power to do so" as suggested by Intervenors.[2] Northside would have to petition the Board of Aldermen for that power and, as Northside represented in the Redevelopment Plan and countless times thereafter:

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[2] Intervenors repeat this mischaracterization later in their brief, representing that the passage of the Northside ordinances rendered their property "subject to eminent domain" (I.Br. 36; *see also* I.Br. 39).

Northside *will not ever* seek the power of eminent domain to uproot citizens of North St. Louis from their homes.

As mentioned, Intervenors begin the section with a quote from their expert—"if things fly"—that mischaracterizes the potential outcomes associated with TIF financing. *See* discussion *supra* at 7-8. Intervenors also state that it is "hard to prove" that no development would occur without TIF financing (I.Br. 14 n.1). However, not even Intervenors' expert challenged the following testimony from Larry Marks of Development Strategies:

> Q: The plan actually says that – and I'm quoting at page 6 – "The extraordinary costs associated with land acquisition and public works and infrastructure needed to redevelop the area have made such redevelopment economically infeasible without the use of TIF." I guess my question to you is, in your experience, don't developers expect some site costs associated with their work on any development?
>
> A: Sure, but typically, in terms of a development project, you would assume costs on your site, connecting, let's say, from a building that's developed to a main sewer line, providing parking, et cetera, on your site, possibly with

> some sidewalks. In this case and in other cases where TIF is required, there's major public infrastructure above and beyond what's normally associated with the project that's required. In this case, the sewer system is shot in that area that is required, lighting, streets, sidewalks. There's just total major infrastructure that often is provided by a city historically that needs to be provided up in that area.

(Tr. Tab IV at 72-73).

The 5th Ward Plan, introduced by Intervenors, predicted that "the speed with which TIF revenues become available will directly affect the amount of money that can be raised and the timing of financing activity" and that there would be "substantial reliance on incremental tax revenue raised from the new development as the primary revenue source to fund the Ward projects" (McIntosh Int. Ex. 10 at 19-2, 19-1; *See also, Id.,* at 19-4; LF 250).

Intervenors' Expert Misunderstood

TIF Financing And The Northside Plan (I.Br. 23-24)

Intervenors rely upon lengthy quotes from their expert witness, Professor Michele Boldrin, to criticize Northside's financial projections and related information. Professor Boldrin is the Chair of the Economics Department at Washington University in

St. Louis (Tr. Tab I 10). Professor Boldrin has had considerable experience consulting with banks and governments outside the United States (Tr. Tab I 12). However, Professor Boldrin has never consulted on real estate development in the United States (Tr. Tab I 108). He has not consulted on TIF matters (Tr. Tab I 13) and has not authored articles or taught classes on TIF (Tr. Tab I 107). Professor Boldrin did not do his own cost-benefit or other analyses (Tr. Tab I 103-5). Professor Boldrin relied upon a "back of the envelope" estimate to criticize Northside's estimated costs and revenues (I. Br. 35; Tr. Tab I, 39, 49).

Perhaps due to his lack of experience in the area, Professor Boldrin believed that the approval of TIF financing contemplated an upfront grant of public money to Northside (Tr. Tab I 42; *see also* Tr. Tab I at 43, 53). Professor Boldrin also believed, and thought it important, that the Board of Alderman had empowered Northside with the power of eminent domain: "[T]he eminent domain also seems to be a key component there" (Tr. Tab I 30, 57).

Northside presented the testimony of Russell Caplin, the author of Northside's projections, and Larry Marks, an independent consultant.

Mr. Caplin is now employed by Optimus Development, an entity related to Northside (Tr. Tab IV 259). He has a Masters in Business Administration, with an emphasis on real estate investment (Tr. Tab IV 260). Following his graduation, Mr. Caplin worked exclusively in the real estate industry, and his work included the preparation of pro forma analyses for real estate transactions, evaluating and providing development loans and raising institutional debt and equity capital for development (Tr. Tab IV 260-61).

Mr. Caplin became involved with the Northside project in 2008 (Tr. Tab IV 262). He became a part of the Northside project team, which included (i) Mr. Marks, (ii) Civitas, the development entity responsible for the large scale redevelopment of Stapleton Airport in Denver, and (ii) Cole and Associates, a civil engineering firm (Tr. Tab IV 264-65). Mr. Caplin prepared the projections that became a part of the cost-benefit analysis (*See* McIntosh Ex. 8, Intervenors' A217). Mr. Caplin utilized, among other data and analyses, Civitas' recommendations for product mix, Cole's civil engineering analyses, construction cost estimates from Paric Corporation and detailed market studies prepared by Mr. Marks and his company, Development Strategies (Tr. Tab IV 269-73).

Mr. Marks has Masters degrees in Urban Design and City Planning (Tr. Tab IV 66). He is employed by Development Strategies, which has been involved in approximately thirty redevelopment projects in the St. Louis metropolitan area (Tr. Tab IV 67). Mr. Marks prepared the cost-benefit analysis submitted with the Redevelopment Plan, following the same process that he followed with other local projects (Tr. Tab IV 102). That process included the preparation of a detailed market study (Tr. Tab IV 84-86, 90-100), consideration of project phasing (Tr. Tab IV 100), meetings with the Northside team and City officials (Tr. Tab IV 103). The Cost Benefit Analysis described the economic impact on the respective taxing districts under the build and no build scenarios by projecting the expected real estate tax, PILOTs and EATs revenues for each under both scenarios (McIntosh Ex. 8 at 3-10, Intervenors' A174-181; Tr. Tab IV 218-20, 223-26).

Estimated Costs and Revenue (I.Br. 25-29)

Northside's projections allow for investor evaluation based upon both the return on equity and the return on cost (Tr. Tab IV 298, 311). Return on cost is an accepted presentation in the development community and constitutes an important check on the reasonableness of the value and cost projections (Tr. Tab IV 274-75, 294). This analysis compares the ultimate costs with the predicted values over the life of the project. *Id.* The hope in any development project is, obviously, that value will exceed costs (Tr. Tab IV 274). However, a gross difference might suggest that estimates of one or the other are off base (Tr. Tab IV 287). Here, without TIF financing, values only marginally exceed costs which demonstrates that the predicted growth rates are, if anything, conservative (Tr. Tab IV 274, 287).

Intervenors state that Northside included TIF revenues as "profit" under its projections (I.Br. 37). To the contrary, Northside listed it as a line item following other project costs and revenues so that it could be easily identified by the TIF Commission and Aldermen (Tr. Tab IV 275).

Financing Commitment (I.Br. 29-31)

Professor Boldrin was critical of the financing commitments contained in Northside's Plan, but did not testify as to what financing commitments the TIF Act required in the context of a large scale, phased redevelopment. As the City TIF Commission Chairman explained, the TIF Commission expects that the reported financing commitments will be tailored to the commercial reality of the redevelopment proposal:

> There are two different kinds of TIF applications and proposals that we look at. One kind is for the development of a specific building or maybe a couple of buildings together, and there you have a developer who you can talk about, who his contractor is, and get a lot of detail.
>
> In other TIF proposals, we deal with a region or a broader area than just a building. For example, in the—what do we call it, the Grand Center. I guess we call it the Grand Center. That is a regional TIF and it was adopted several years ago, as opposed to a single building.
>
> * * *
>
> The choice—I mean, I think it's three or four years ago, we did the Grand Center. Just recently, they…finished a building and that all gets the TIF financing, and there are other buildings in Grand Center that aren't done yet, and we understand under those circumstances that what you can say about the financing is less definite that what you can say when

> it's a given building and somebody is giving a definite amount or a definite lending and financing plan.

(10/29/09 Tr. 108-9).

In the regional context, the Chairman explained, the TIF Commission does not expect to see a firm commitment:

> No TIF project ever has a firm commitment in the sense of a bank commitment, and the reason for that is that the financial institutions are sitting on the side and they're not going to make a commitment until they know what other incentives are in place so that they understand what the value is, so what we do is that we say–we make certain assessments about what the financing is going to be.
>
> We approve the TIF for a maximum amount against that overall view of the project, but what ultimately resolves what the amount of the TIF is comes several steps down the process….

Id. at 110-11.

The Northside plan contemplates the redevelopment of 1500 acres over a twenty-three-year period at a total cost exceeding $8 billion (A264, 276-284). Every witness asked agreed that it would not be commercially reasonable to expect any lending institution to issue a firm commitment, on day one, to lend $8 billion toward the redevelopment project because no one could predict the evolution of economic conditions or the redevelopment plan over its twenty-three-year life (10/29/09 Tr. at 145-46, 159-60 (Griffin) and 110-11 (Newburger); Tr. Tab III at 104 (Eckelkamp); Tr. Tab IV at 312 (Caplin); Tr. Tab I 74-75 (Boldrin)). Alderwoman Griffin testified:

> This, we understood from the very beginning, the plan says it's a twenty-three-year plan and it's proposed in phases, so we weren't looking for—you can't show us the day you're going to have financing, whether you need financing for the whole thing, plus you have to be creative, especially in today's market, with the way you get projects financed anyway, and we know that from some of our other projects so it was—we were looking to make sure that they were leveraging everything, including from the City, from the State, any stimulus money that they might be receiving, you know, any equity that they had in terms of their property.[3]

(10/29/09 Tr. 160 (Griffin)).

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[3] Alderperson Griffin also reviewed feasibility and market studies well beyond those typically submitted in connection with TIF applications, which indicated a superior level of investment and commitment. *Id.* at 159.

The Redevelopment Plan references various sources of financing for phases A-D:

> Appendix B contains a commitment letter from the Bank of Washington to provide financing for RPA A and RPA B. Said commitment letter will be supplemented when subsequent Redevelopment Projects are approved. The Developer also commits to finance Redevelopment Projects Costs through a combination of equity, conventional financing, and TIF Obligations that would be purchased or privately placed by the Developer.

(A 289; LF 289). The Plan also references various tax credit programs as sources of funds. *Id.*

The Plan included a letter from the Bank of Washington committing to finance RPA A and B provided the Board approved TIF financing (A323). The Bank's letter, and its stated condition of TIF financing, is typical of those submitted in connection with TIF applications in the City (10/29/09 Tr. 110, 115). However, the Bank's letter was different from most in that it followed an existing loan of nearly $30,000,000 (10/29/09 Tr. 116, 160-61).

> Q: (by Mr. Amon) The letter that you provided for this particular redevelopment plan, is this a firm commitment?

A: I think that it's a firm commitment from the perspective that we were already $28 million into the deal.

Q: And that's what that refers to?

A: No. It's a reiteration of our commitment and, again, as I said before, we continued to finance since we wrote this letter. There's been loan pay-offs and we've continued to make additional loans. I made a loan two weeks ago in this.

(Tr. Tab III 106). The Bank's involvement followed the historical (and anticipated future) incremental investment by the developer and its lender. *Id.* at 98-99. *See also,* Tr. Tab IV 312.

The City also looked beyond the Bank's letter and the representations contained in the Redevelopment Plan. Both the Commission and the Board considered Paul McKee's existing investment in the redevelopment area as further evidence of the financing commitments, described by the TIF Commission Chairman as "a considerable equity bundle and much more that we would ordinarily see" (10/29/09 Tr. 116; *see also* 10/29/09 Tr. 158-59 (Griffin testimony)).

Comprehensive Plan (I.Br. 32-33)

The City adopted a comprehensive plan in 1947 (Tr. Tab II 252). Mayor Slay recognized that the plan was out-dated and commissioned a community development block grant for the creation of a modern land use plan (Tr. Tab II 252). As a result of that effort, on January 5, 2005, the City Planning Commission adopted a Strategic Land Use Plan for the City of St. Louis (D.Ex. K[4]; Tr. Tab II 252). In its preamble, the Strategic Land Use Plan stated:

> In 1947, more than fifty years ago, the City of St. Louis adopted a land use plan. The City has been living with this out dated land use plan ever since. Now, the City's Planning and Urban Design Agency is proposing a ***new land use plan.***
>
> * * *
>
> Adopted by the City's Planning Commission on January 5, 2005, this straightforward Land Use Plan ***will become the basis for additional planning and development initiatives*** involving collaboration between elected officials, City departments, neighborhood residents and developers, to overlay more fine-grained visions of the broader framework presented by this Plan. (emphasis added)

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[4] This was added to the record by Intervenors as part of their Appendix filed separately with the Court.

The Strategic Land Use Plan indicated that prior neighborhood plans, like the 5th Ward Plan, "have been taken into account in preparing this broader-level Land Use Plan." *Id.* The Strategic Land Use Plan provides: "This Plan, like the City itself, is not a static object. Rather, it is intended to provide a foundation and a roadmap for positive change." *Id.*

Intervenors refer to the Strategic Land Use Plan as "just that, a 'map' of existing zoning" (I.Br. 67). There is no basis for such a characterization. The Strategic Land Use Plan does not depict zoning districts. The plan does state that current City zoning districts are "problematic" and lack conformity with the plan. The Plan indicates that "once this Plan is adopted, zoning designations will be modified to conform to the plan."

Since its adoption, the City has referred to the Strategic Land Use Plan in connection with TIF and other redevelopment projects (Tr. Tab II 19, 68; Tr. Tab III 18-19, 206, 207; Tr. Tab IV 252, 254).

The Redevelopment Plan provides that it conforms to the Strategic Land Use Plan, as does the Board's enabling ordinance (McIntosh Ex. 4 at 10, A267). The Redevelopment Plan contains a description of its projects and a land use plan that, in fact, are in agreement and harmony with the flexible guidelines of the Strategic Land Use Plan (McIntosh Ex. 4 at 20, A277; Tr. Tab IV 68-69).

ARGUMENT

II. THE TRIAL COURT ERRED IN RULING THAT THE REDEVELOPMENT ORDINANCES LACKED A REDEVELOPMENT PROJECT AND THEREFORE DID NOT SATISFY THE TIF ACT BECAUSE THE TRIAL COURT'S NEW DEFINITION OF A REDEVELOPMENT PROJECT AS "A SPECIFIC PLAN OR DESIGN" IS CONTRARY TO THE BROAD DEFINITION OF REDEVELOPMENT PROJECT UNDER, AND THE INTENT OF SECTION 99.805(14) OF THE TIF ACT IN THAT THE TIF ACT REQUIRES ONLY "ANY DEVELOPMENT PROJECT" AND THE REDEVELOPMENT ORDINANCES INCLUDED A REDEVELOPMENT PROJECT WITHIN THE MEANING OF THE TIF ACT. (I.Br. 49)

Intervenors did not plead, discuss, argue or brief whether Northside's plan included a redevelopment project before the trial court. The issue did not merit a word from Intervenors until this appeal.

Their argument begins with a misstatement of Appellants' position: "We did not need to have a 'project'" (I.Br. 49), which they repeat throughout their brief (*E.g.*, I.Br. 37, 54, 56). Intervenors reformulate Northside's position because it is easy for them to argue over whether TIF financing requires a development project. It is a non-issue; everyone agrees that it does. The more difficult question that is central to this appeal—what did the legislature mean by "any development project within a redevelopment area"—requires consideration of legislative intent, legislative purpose and market realities. Intervenors have an interesting approach to that important question. They ignore it. Intervenors simply assume, without substantive analysis, that the legislature intended the trial court's "shovel ready" definition of a "project."

A. The Trial Court's Definition Is Contrary To The Legislative Intent And Purpose Of The TIF Act

When construing a statute, it is the Court's:

> duty to ascertain the intention of the legislature as expressed and give to the words employed their usual and ordinary meaning. Also, we must seek to gather the intent of the legislature from the ordinary meaning of the words used, considering the whole statute and its legislative history and, if necessary, considering also the circumstances and usages of the time, the result to be accomplished thereby, and to promote the purpose and objects of the statute, and to avoid any strained or absurd meaning. Further, the lawmaking body's own construction of its language by means of definition of the terms employed should be followed in the interpretation of the statute to which it relates and is intended to apply and supersedes the commonly accepted dictionary or judicial definition and is binding on the courts.

In re Estate of Hough, 457 S.W.2d 687, 691 (Mo. 1970)(citations omitted). The Court should give general words a general construction. *Hammett v. Kansas City,* 173 S.W.2d 70, 75 (Mo. 1943). Finally, the Court should not read words in isolation: "Rogers' argument focuses in isolation on a few words within a much longer clause. This we cannot do." *Rogers v. McGuire,* 288 S.W.3d 328, 330 (Mo.App. S.D. 2009).

The trial court's parsing of the TIF Act's definition of "redevelopment project" violates each of these tenets. The trial court defined "project" in isolation from the word "development" that modifies it, thus stripping the definition of its statutory and commercial context. The trial court inexplicably applied an exceedingly narrow construction to a concededly broad definition. That reading is at odds with the balance of the TIF Act, where the legislature was quite capable of, and did, provide detailed requirements where it deemed necessary. Consider, for example, the definition of "economic activity taxes" also found in §99.805, or the laundry list of requirements for development *plans* (§99.810) or the exacting notice requirements for hearings (§99.830).

The legislature intended the TIF Act to imbue municipalities with "maximum opportunity" to foster urban redevelopment[5] and was aware, when it enacted the law, of the courts' longstanding deference to municipal implementation of redevelopment statutes. Against that backdrop, it defined "redevelopment project" to mean "any development project within a redevelopment area." Neither Intervenors nor the trial court indicate why the term "development project" does not provide a municipality with sufficient guidance to structure its agreement with a putative

[5] *See* cases cited at page 35 of Northside's Substitute Brief.

redeveloper, an important consideration given the court's duty to follow the "lawmaking body's own construction of its language." *In re Hough, supra.* Neither the Intervenors nor the trial court offer any justification for the "strained [and] absurd" result that a municipality's adoption of $390,000,000 in TIF financing should turn on a developer's initial agreement to build a sewer. *Id.*

The City, not the trial court, should be left to determine how it will structure "any development project" within a TIF redevelopment area. The City and its development agencies are certainly capable, once having seen Northside's plan, to decide whether it is enough to:

- Provide for the commencement dates for the site work (McIntosh Int. Ex. 4 at 10; McIntosh Int. Ex. 3, ¶3.4; A167)
- Establish (i) the procedures applicable to the hiring of subcontractors, (ii) the procedures and standards governing the preparation of construction plans and (iii) the implementation of sustainability features in the redevelopment (McIntosh Int. Ex. 3, ¶¶3.4, 3.6 and 3.9; A167, 168-169)
- reserve termination rights triggered by, among other things, Northside's failure to complete the redevelopment work (McIntosh Int. Ex. 3, ¶ 7.27; A185-186)
- Require that Northside complete certain demolition and rehabilitation projects on an accelerated basis (McIntosh Int. Ex. 4 at 16; McIntosh Int. Ex. 3, ¶7.19; A183-184)

- Require that Northside complete, at its own cost, the public infrastructure projects prior to seeking TIF subsidy (McIntosh Int. Ex. 3, ¶4.2; A172)

Those elements established a redevelopment project in the ordinary, commercial sense of the words.

Those requirements also differentiate this case from *Shelbina,* where the city created and approved its own redevelopment plan, complete with TIF financing, in the hope that the subsidized plan might "enable the City to select redevelopers to carry out the redevelopment program activities envisioned by the Plan." *City of Shelbina v. Shelby County,* 245 S.W.3d 249, 253 (Mo.App. E.D. 2008). The city "*assume[d] that multiple redevelopment projects will be undertaken* over the life of the Plan" and issued a request for proposals seeking a private redeveloper. *Id.* (emphasis in original). The City's plan explicitly "anticipated" the future identification of a redeveloper and redevelopment projects. *Id.* The Court of Appeals ruled that the city's unrealized effort to attract redevelopment, without more, did not constitute a redevelopment project. The city there could not claim a development project because it could not even represent that a developer was willing to sign on the dotted line. *Shelbina* simply has no relevance here, except for the fact that the Court of Appeals did not find it necessary to redefine "redevelopment project" to apply the statute.

Even if the Court feels that a redefinition is required, and that the trial court got it right, Northside satisfied the statute. Both the Redevelopment Plan and Redevelopment Agreement required Northside to identify buildings for demolition and rehabilitation, and to complete the work by a date certain (McIntosh Int. Ex. 4 at 16; McIntosh Int. Ex. 3, ¶7.19; A183-184). Intervenors acknowledge *this* point, but, true to form, recharacterize the requirements to their liking. Apparently believing that the demolition of buildings is not a project, Intervenors ignore Northside's obligation to rehabilitate structures, and say that the Plan and Agreement do not involve "anything to be built, but says there is to be a list of future buildings to be demolished" (I.Br. 54-55). The rehabilitation (and, frankly, demolition) of buildings is, by any measure, a "project." It is, in the context of urban renewal, quite a necessary project, just the same as the reclamation of the City's streets, sidewalks and other infrastructure. There is simply no way to achieve the vertical and other redevelopment without the support and completion of these infrastructure projects.

The Redevelopment Ordinances thus provided a redevelopment project consistent with the trial court's request for a document that said "sanitary sewers will be constructed in City Block 1000, commencing on such-and-such a date, at an estimated cost of so many dollars" (7/2 Ruling at 38; LF 348). This is not "Alice in Wonderland," to quote Intervenors (I.Br. 54); it is real work that had to be done by a date certain.

B. The Trial Court Correctly Ruled That The Redevelopment Plan Satisfied RSMo §99.810.1 In That The Redevelopment Plan Included A Statement Of The Estimated Redevelopment Project Costs (I.Br. 60-61)

Section 99.810.1 provides in full as follows:

> Each redevelopment plan shall set forth in writing a general description of the program to be undertaken to accomplish the objectives and shall include, but need not be limited to, the estimated redevelopment project costs, the anticipated sources of funds to pay the costs, evidence of the commitments to finance the project costs, the anticipated type and term of the sources of funds to pay costs, the anticipated type and terms of the obligations to be issued, the most recent equalized assessed valuation of the property within the redevelopment area which is to be subjected to payments in lieu of taxes and economic activity taxes pursuant to section 99.845, an estimate as to the equalized assessed valuation after redevelopment, and the general land uses to apply in the redevelopment area. *No redevelopment plan shall be adopted by a municipality without findings that*: [listing items] (emphasis added)

Section 99.810.1 contains two discrete categories. First, it provides that a redevelopment plan shall "include" certain items, including the estimated redevelopment costs and anticipated sources of funds. Second, it provides that a municipality cannot approve a redevelopment plan without certain findings, which do not include "the estimated redevelopment project costs, the anticipated sources of funds to pay the costs." Northside has not located any case law addressing the significance of the two clauses, but the duality of the statute appears purposeful. The first clause, the list of items "to be included," serves as a checklist to ensure uniformity of submissions and to ensure that the TIF Commission has a minimum level of information to guide its review before the Commission makes its recommendation to the Board. The checklist would also serve as a statutory basis for the Commission—and, thereafter, the Board—to request additional information from the applicant if the circumstances of the proposed redevelopment and submission so warranted. The separate clauses suggest that the legislature accorded less significance to the checklist than the explicit preconditions found in the second sentence. As the trial court indicated in a related context, "[t]he statute does not demand any level of detail" regarding the project costs or sources of funds (7/2 Ruling at 26, LF 336).

Intervenors' argument regarding the statement of project costs consists solely of a lengthy quotation from their expert, Professor Boldrin, most of which has nothing to do with "the estimated redevelopment project costs, the anticipated sources of funds to pay the costs" cited at the beginning of the section. The quote is significant only in that it highlights the paucity of Professor Boldrin's analysis, which he describes as a "back of the envelope estimate."[6]

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[6]Professor Boldrin appeared at his deposition prepared to give his final opinions without having read the Cost-Benefit Analysis (Tr. Tab I at 99-101). After the deposition was adjourned, he spent an hour looking at it to give his new final opinion (Tr. Tab I at 101).

Northside's projections attached to the Cost Benefit Analysis as Addendum B were prepared by Russell Caplin. Mr. Caplin laid out the bases for his assumptions and that testimony stands as the only substantial, uncontroverted evidence on the issue. Although Intervenors and Professor Boldrin apparently question the projected growth and absorption rates, they did not present any alternative assumptions or any authoritative materials undermining Caplin's analysis or approach. Even if they had, that likely would not have been enough to overcome the substantial deference due the City:

> We acknowledge Plaintiffs' argument that the statements made by City's experts were mere conclusions and not supported by substantial evidence. Independently reviewing the record, we find, however, that the experts provided bases for their opinions and that each had experience in the field of urban planning and redevelopment.
>
> After fully and independently considering all of the evidence and being mindful of our standard of review, *it is evident that the but-for test was an issue upon which the experts had differing opinions. To the extent this was a debatable issue upon which Board decided the test was satisfied, this court cannot substitute its judgment for that of Board*. Plaintiffs have failed to establish that the decision was arbitrary

or induced by fraud, collusion or bad faith. Point two is denied.

JG St. Louis West v. City of Des Peres and West County Center, LLC, 41 S.W.3d 513, 521 (Mo.App. E.D. 2001)(emphasis added).

C. The Trial Court Correctly Ruled That The Redevelopment Plan Satisfied RSMo § 99.810.1 In That The Redevelopment Plan Included Evidence Of Commitments To Finance The Project Costs (I.Br. 61-63)

The statutory reference to financing commitments is also found in the preamble to §99.810.1, and also is not listed as one of the conditions to approval of a redevelopment plan.

As the trial court indicated, "[t]he statute does not demand any level of detail" regarding financing commitments (7/2 Ruling at 26, LF 336). The courts have followed suit. The first case to deal with the sufficiency of financing was *Parking Systems, Inc. v. Kansas City,* 518 S.W.2d 11 (Mo. 1974), in which the Supreme Court addressed the sufficiency of a plan approved under a Kansas City ordinance requiring "*a determination by the City Council* that 'sufficient funds or securities are immediately available and will be used for normal financing of the entire development.'" *Id.* at 16 (emphasis added). Much the same as here, the challenging party complained that:

> (a) The only entity to furnish funds was the Redevelopment Corporation, a "shell" corporation with a deficit; (b) The Redevelopment Corporation is

excused from performance in the event it cannot obtain financing satisfactory to it; (c) No person or entity other than the Redevelopment Corporation was committed to furnish funds except Durwood, Inc. which was to furnish $434,000 for the cost of demolition; (d) The City relied on letters from banks addressed to Stanley Durwood, Durwood, Inc., indicating that the banks would make loans if "adequate collateral" was furnished, but the City made no investigation as to what constituted adequate collateral; (e) The only letter concerning availability of funds for construction of improvements was "from Fred Brady to Stanley Durwood, President of Durwood, Inc., indicating that many of their institutional investors would be interested in lending money," and the City "did not regard this as a commitment;" and (f) Durwood, Inc. was "not in a financial condition to furnish funds or collateral to finance the demolition and funds which, when added to the land in the project area, would be sufficient to borrow additional funds to finance even the cost of acquisition of the property in the project area."

Id. at 17.

The Supreme Court held that, even under the stringent language of the ordinance, the redeveloper need not prove that it has "the required amount of money in the bank, or a sufficient amount of securities in hand." *Id.* at 19. The Supreme Court held that the sufficiency of the financing was at least debatable, citing the following testimony that parallels the evidence in this case:

> A. The requirements that the Council made over and above the requirements of the statute were that we be satisfied that the applicant at least had the ability to acquire the land and clear the blight in question and that could have been, that information could have been supplied a number of different ways. I suppose if they had a pile of money on the table that would have satisfied me. In this case letters of commitments and other evidence was supplied that eventually was satisfactory.
>
> Q. There never was any evidence submitted that they had the cash on hand, available to acquire the land and clear the blight?
>
> A. No, I think not.
>
> Q. So, in fairness when you get down to it, in this particular case, it was the letters from the banks, was it

> not that calmed any doubts that you had?
>
> A. No, it was a combination of what was presented * * * which included letters from banks. It included appraisals of the relative value of the land and the cost to clear the blight therefrom and it included what amounted to some live testimony at hearings before the Committee and eventually one hearing before the City Council and as I [said] in all honesty it was a combination of all those items that finally convinced me that this applicant did meet the test as required by the ordinance.

Id. at 21-22.

Intervenors rely principally upon the Eastern District's opinion in *Maryland Plaza Redev. Corp. v. Greenberg,* 594 S.W.2d 284 (Mo.App. E.D. 1979). In *Maryland Plaza,* against an ordinance requiring a detailed statement of the proposed method of financing, the redeveloper refused to identify its lending sources and submitted a plan supported by its bare representation that "[a]t the present time it is contemplated that debt financing will be on a structure-to-structure basis." *Id. at* 289. The court contrasted its situation with *Parking Systems*, and the testimony quoted above. The Eastern District has questioned the reach of *Maryland Plaza* in its later decisions.

In *Devanssay v. McGuire,* 622 S.W.2d 323, 327 (Mo.App. E.D. 1981), the Eastern District stated that "[w]e do not read *Maryland Plaza* to impose any particular requirements on the statement of financing or to hold that the validity of the Board's action can be determined only from the information contained in the financing section of the plan or only from the body of the plan itself." The Court found it could "presume a certain expertise in the…Board of Aldermen of the potential of financing in the City of St. Louis and through governmental agencies." *Id.* at 328. *See also, Tierney v. The Planned Ind. Expansion Auth. of Kansas City,* 742 S.W.2d 146, 153 (Mo. 1987)("The holding [in *Maryland Plaza*] has perhaps been somewhat qualified in [*Devanssay*], which appears to relax the requirements for detailed financial information, and holds that the legislative body's conclusion that adequate information has been furnished is entitled to substantial weight").

While Intervenors are highly critical of Northside's Plan, neither Intervenors nor Professor Boldrin have ever indicated what the evidence of financing commitments *should contain* in the context of a large scale, phased redevelopment. The City TIF Commission appropriately expects that an applicant's financing commitments will be tailored to the commercial reality of the redevelopment proposal. In the context of large-scale, phased redevelopments, the TIF Commission does not expect to see a firm commitment to finance all project costs at the outset. Even Professor Boldrin conceded this point: "If Citibank did that—all right, you know where I'm going—it would be considered ridiculous, so it's just something that makes no sense. No serious bank would look at that and say, yeah, they're going to do that." (Tr. Tab I 74-75). Accordingly, the Redevelopment Plan references various sources of financing for phases A-D, including the Bank of Washington (McIntosh Ex. 4 at 32, A289).

As the trial court pointed out:

> Evidence supporting the findings of the legislative body need not have been before that body at the time of approval of the ordinances, nor need the evidence available to the legislative body be demonstrated to have been accurate. The question is whether, on the evidence available, the legislative determination is fairly debatable. (7/2 Ruling at 20, LF 330).

The discretion afforded the City would mean little if the City could not assess the adequacy of the financing commitments in context of a plan's scope and duration. While it might be reasonable to expect something approaching a firm, all-encompassing commitment to finance the redevelopment of a single building, it is not commercially reasonable to expect any financial institution to commit to a twenty-three-year, $8 billion loan covering the redevelopment of 1500 acres. It is, at the least, fairly debatable that Northside's plan demonstrated the necessary evidence of financing commitments.

D. Northside's Cost Benefit Analysis Satisfied R.S.Mo. § 99.810.1(5) (I.Br. 64-65 and 69-71)

Section 99.810.1(5) requires in pertinent part "[a] cost-benefit analysis showing the economic impact of the plan on each taxing district which is at least partially within the boundaries of the redevelopment area. The analysis shall show the impact on the economy if the project is not built, and is built pursuant to the redevelopment plan under consideration."

Intervenors' brief argument begins with the childish remark that Northside's cost-benefit analysis is a "joke" because it does not refer to a specific redevelopment project. In this instance, Intervenors' disrespectful comment only highlights their (and, on this point, the trial court's) misunderstanding of the TIF statute.

Section 99.810.1(5), provides in full as follows:

> ....No *redevelopment plan* shall be adopted by a municipality without findings that:
>
> * * *
>
> (5) A cost-benefit analysis showing the economic impact *of the plan* on each taxing district which is at least partially within the boundaries of the redevelopment area. The analysis shall show the impact on the economy if the *project* is not built, and is built pursuant to the redevelopment plan under consideration. The cost-benefit analysis shall include a fiscal impact study on every affected political subdivision, and sufficient information from the developer for the commission established in section 99.820 to evaluate whether the *project* as proposed is financially feasible;

RSMo § 99.810.15)(emphasis added).

The legislature could not have intended that §99.810.1 (5)'s reference to a "project" refer to "redevelopment project" because municipalities are free to adopt redevelopment plans without a corresponding redevelopment project: "No redevelopment project shall be approved unless a redevelopment plan has been approved and a redevelopment area has been designated *prior to or* concurrently with the approval of such redevelopment project. RSMo §99.820.1 (emphasis added). Section 99.825.1 also contemplates the approval of redevelopment plans prior to the approval of redevelopment projects and requires a public hearing "[p]rior to the adoption of an ordinance proposing the designation of a redevelopment area, or approving a redevelopment plan *or* redevelopment project…." (emphasis added). The redeveloper need only present a "redevelopment project" when it applies for TIF financing under the plan and there is no statutory requirement that the redeveloper re-submit or submit a cost-benefit analysis at that time. RSMo §99.845.

Further, to tie a cost-benefit analysis to a discrete project within a broad plan would violate the purpose of the analysis. The cost benefit analysis serves as a planning tool for the municipality, designed to assist the municipality's assessment of whether the planned redevelopment will generate incremental tax revenues (the "benefit") that exceed the commitment of a portion of those revenues to repay reimbursable infrastructure project costs (the "cost")(Tr. Tab 3 at 219-20; Tr. Tab 4, 82-83, 101-3). That analysis is only meaningful in the macro sense of the entire project (which is the analysis that Northside provided), because it is the totality of the costs and benefits that are and should be of concern to a municipality.

The legislature made specific reference to "redevelopment" projects when discussing other requirements of redevelopment plans in the same statute. *See, e.g.*, §99.810.11), (3). The use of the word "project" can only be meant to refer to the overall project proposed under the plan (whether or not more specific *redevelopment* projects are identified).

The balance of Intervenors' argument is that this Court should accept Professor Boldrin's assessment of the cost-benefit analysis over that of Development Strategies and Mr. Caplin. At most, Intervenors' argument merely raises "an issue upon which the experts had differing opinions. To the extent this was a debatable issue upon which Board decided the test was satisfied, this court cannot substitute its judgment for that of Board." *JG St. Louis West,* 41 S.W.3d at 521.

For example, Intervenors quote from Professor Boldrin's testimony that a twenty percent growth rate is unattainable, implying, incorrectly, that Northside predicted a twenty percent growth rate over the life of the Plan (I. Br. 65). Professor Boldrin is actually referring to a growth spike that Northside predicted based upon the market reactions to the implementation of redevelopment projects in Chicago, Miami, and Denver (Tr. Tab IV 272-74, 281-82). Intervenors place undue emphasis upon the temporary growth spike. The spikes are ratcheted down and ultimately replaced by a 2% growth rate over the life of the project. The more important analysis compares the ultimate costs with the predicted values over the life of the project. Here, without TIF financing, values only marginally exceed costs which demonstrates that the predicted growth rates are, if anything, conservative (Tr. Tab IV 274, 287). Professor Boldrin's apparent disagreement is just that, "an issue upon which the experts had differing opinions." *JG St. Louis West,* 41 S.W.3d at 521.[7]

E. The Redevelopment Plan Contained The Requisite Finding That It Was Consistent With The City's Comprehensive Plan (I.Br. 65-68)

Section 99.810.1(2) requires the Board to find that "[t]he redevelopment plan conforms to the comprehensive plan for the development of the municipality as a whole." Conforms means "to be in agreement or harmony." *City of St. Charles v. Devault Management,* 959 S.W.2d 815, 824 (Mo. App. E.D. 1997).

Intervenors *again* misstate the record, referring to the Strategic Land Use Plan as a "zoning map" that showed only "existing zoning" (I.Br. 67). One of the few things *not shown* on the Strategic Land Use Plan are zoning districts, which the plan

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[7] In their statement of facts, Intervenors state that Northside reported TIF revenues as "profit" (I. Br. 26), although they make no further mention of it. Intervenors are reading the cost-benefit analysis wrong. Northside's projections are comprehensive and complex (McIntosh Ex. 8 at Appendix B; Intervenors' A217). Given the purpose of the cost-benefit analysis, Mr. Caplin purposefully stated TIF revenues separate from the body of the analysis to facilitate Commission and Board review (Tr. Tab IV, 275-6).

recognizes are "problematic" and lack conformity with the plan. The Plan indicates that "once this Plan is adopted, zoning designations will be modified to conform to the plan."

Intervenors ask this Court to disregard the City's adoption of its Strategic Land Use Plan as its comprehensive plan. Chapter 99 does not define "comprehensive plan." The Missouri courts generally refer to Chapter 89, which governs city planning commissions. Section 89.340 authorizes the City Planning Commission to adopt a city plan:

> The commission shall make and adopt a city plan for the physical development of the municipality. The city plan, with the accompanying maps, plats, charts and descriptive and explanatory matter, ***shall show the commission's recommendations for the physical development and uses of land***, and ***may include***, among other things, the general location, character and extent of streets and other public ways, grounds, places and spaces; the general location and extent of public utilities and terminals, whether publicly or privately owned, the acceptance, widening, removal, extension, relocation, narrowing, vacation, abandonment or change of use of any of the foregoing; the general character, extent and layout of the

> replanning of blighted districts and slum areas.
>
> (emphasis added)

Section 89.360 acknowledges that the plan should and will evolve with the changing demands of the municipality: "The commission may adopt the plan as a whole by a single resolution, or, as the work of making the whole city plan progresses, may from time to time adopt a part or parts thereof, any part to correspond generally with one or more of the functional subdivisions of the subject matter of the plan." A city's comprehensive plan need not be a single document. *State ex rel. Westside Development Co., Inc. v. Crist,* 935 S.W.2d 634, 640 (Mo.App. W.D. 1994).

For planning purposes, the planning commission may build flexibility into the plan using terms such as "flexible guideline" and the like, and the Court will honor the commission's directive. *Devault Management,* 959 S.W.2d at 823, citing *Treme v. City of St. Louis,* 609 S.W.2d 706 (Mo. App. E.D. 1980).

The City adopted a comprehensive plan in 1947 (Tr. Tab II 252). There is no dispute that, in 2005, the City Planning Commission adopted a Strategic Land Use Plan for the City of St. Louis in its stead (D.Ex. K[8]; 3/4 Tr. 252 (Geisman)).

The Strategic Land Use Plan stated:

> In 1947, more than fifty years ago, the City of St. Louis adopted a land use plan. The City has been living with this out dated land use plan ever since.

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[8] *See* note 7, *supra.*

> Now, the City's Planning and Urban Design Agency is proposing a ***new land use plan.***
>
> * * *
>
> Adopted by the City's Planning Commission on January 5, 2005, this straightforward Land Use Plan ***will become the basis for additional planning and development initiatives*** involving collaboration between elected officials, City departments, neighborhood residents and developers, to overlay more fine-grained visions of the broader framework presented by this Plan. (emphasis added)

The Strategic Land Use Plan identifies and explains ten separate strategic land use designations, and plots their likely implementation within the City limits. Since its adoption, the City has referred to the Strategic Land Use Plan in connection with TIF and other redevelopment projects (2/25(1) Tr. 19, 2/25(2) Tr. 18-19; 2/25(2) Tr. 206, 207, 3/3 Tr. 68; 3/3 Tr. 252, 254).

Finally, there is no dispute that the Redevelopment Plan's projects and land use plan are, in fact, in agreement and harmony with the flexible guidelines of the Strategic Land Use Plan (McIntosh Ex. 4 at 20, A277; 3/3 Tr. 68-69). Intervenors do not argue to the contrary and, in any event, any deviations are properly reserved for the municipality's discretion:

> We find no disabling disharmony between the 1978 plan and the uses proposed in 1982. Under the city's zoning ordinances "commercial" zoning is "higher" than light industrial zoning, and the classifications are cumulative, so that commercial uses are permissible in a light industrial area. *Planning is a continuing process, and a plan cannot remain static or inviolate.* The City Plan Commission and the City Council are charged with the responsibility for comparing the PIEA proposal to the preexisting plans and determining whether there is substantial compliance. To the extent that there are differences, we must assume that the duly constituted authorities concluded that the preexisting plans should be modified. The owners would introduce inflexibility and invite close judicial scrutiny, in a way not contemplated by the governing legislation.

Tierney, 742 S.W.2d at 152-53 (construing a similar requirement under the Planned Industrial Expansion Act)(emphasis added).

The Redevelopment Plan satisfies RSMo § 99.810.1 (2).

<u>RESPONSE BRIEF ON CROSS-APPEAL</u>

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING

INTERVENORS' REQUEST FOR ATTORNEYS' FEES AND COSTS.

Intervenors have demonstrated a willingness to mischaracterize the record and Northside's arguments. Intervenors may not share Mr. McKee's vision for the redevelopment of the north side, but that does not excuse their mendacious tactics. The Court should deny Intervenors' request for fees.

Intervenors' counsel represented to the trial court that they were acting *pro bono* (LF 155). In their sole point on cross-appeal, Intervenors argue that the trial court abused its discretion in denying their request for attorney's fees. It is settled that:

> The trial court is considered an expert at awarding attorney's fees, and may do so at its discretion. To demonstrate an abuse of discretion, the complaining party must show the trial court's decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice.

Howard v. City of Kan. City, 332 S.W.3d 772, 792 (Mo. 2011) *citing Weissenbach v. Deeken*, 291 S.W.3d 361, 362 (Mo. App. 2009), *Russell v. Russell*, 210 S.W.3d 191, 199 (Mo. banc 2007).

Intervenors ask the Court to award fees under §527.100 of the declaratory judgment act, which permits the trial court to award "costs" as may seem equitable and just. The Missouri courts allow an award of fees under this statute only under very limited circumstances:

> [S]everal cases have recognized that attorneys' fees may be awarded as costs under section 527.100, RSMo, where very unusual circumstances have been shown. In the absence of contract or statute, our courts have rarely found the very unusual circumstances that permit the award of attorneys' fees. Such fees have been denied in cases of an improper tax assessment, when a defendant tendered a check on insufficient funds with an intent to defraud, when defendants tortiously conspired and threatened to wrongfully foreclose on notes and deeds of trust, and when defendants fraudulently concealed the existence of an outstanding deed of trust on a house. Such fees have more often been approved where paid out of a *res* and the litigation was designed to benefit the *res* or give direction to the management or distribution thereof.

David Ranken, Jr. Technical Inst. v. Boykins, 816 S.W.2d 189, 193 (Mo. 1991)(citations omitted).

Intervenors' argument for attorneys' fees is little more than a disagreement with the trial court's adverse ruling on their pleaded challenges to the Redevelopment Ordinances. Intervenors argued these points zealously below, and lost. While Intervenors may believe that Northside's TIF application was "frivolous, without substantial legal grounds, and both reckless and punitive," the trial court's conclusion that the Board of Aldermen's approval of the Redevelopment Plan was fairly debatable in all respects but the one issue "detected" by the trial court indicates conclusively otherwise.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies the foregoing Substitute Reply Brief and Response Brief on Cross Appeal of Appellant Northside Regeneration, LLC (Intervenors Nelson and McIntosh) complies with the requirement of Rule 84.06 b(2) and Local Rule 365. This brief contains total 9,068 words (8,603 in the Reply portion and 465 in the Response portion) as determined by the software application for Microsoft Word.

The foregoing was served on this 17th day of September, 2012 via the Court's ECF system to the following:

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